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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1775

THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JACK B. WESTCOTT,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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v.

JACK B. WESTCOTT,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Introductory Statement

The Commonwealth of Massachusetts hereby petitions this Court for a writ of certiorari to review a judgment of the Supreme Judicial Court of Massachusetts.

Opinions Below

The opinion of the majority of the Justices of the Supreme Judicial Court is reported at MASS. ADV. SH. (1976) 696-703 and is appended hereto at pp. A-1 through

A-6. The opinion of the dissenting Justice of the Supreme Judicial Court is reported at MASS. ADV. SH. (1976) 704-716 and is appended hereto at pp. A-6 through A-16.

Jurisdiction

The judgment of the Supreme Judicial Court was entered on March 12, 1976 and is appended hereto at p. A-17. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3) (1966).

Question Presented

Whether the Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107, insofar as it differentiates between residents and non-residents of Massachusetts relative to the right to fish in Massachusetts waters, violates the Privileges and Immunities Clause contained in Article IV, § 2 of the United States Constitution.

Statute Involved

Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107.

> It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running

> from the extreme western point of Gay Head to the extreme western point of Nashawena Island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars.

Statement of the Case

The Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107, makes it unlawful, during the months of July, August and September, for any person who has not been a legal resident of Massachusetts during the preceding year to use beam or otter trawls to drag for fish in certain of the State's waters. On September 5, 1973, Jack B. Westcott was arrested by an officer of the Massachusetts Department of Natural Resources for allegedly violating the 1923 Act. On April 24, 1974, he was tried and found guilty by the District Court of Massachusetts.

Upon his conviction in the District Court, Westcott pursued his right to *de novo* review in the Superior Court, wherein he filed a motion to dismiss the action. The grounds of the motion were that the 1923 Act, insofar as it differentiates between residents and nonresidents of Massachusetts, violates: (1) the Privileges and Immunities Clause contained in Article IV, § 2 of the United States Constitution and (2) the Equal Protection Clause of the United States Constitution. In addition to Westcott's motion, the parties submitted to the Court an agreed statement of facts. The statement indicated that, at the time of his arrest, Westcott was a resident of Rhode Island and had not been a resident of Massachusetts during the preceding year or during the year preceding July

1, 1973. It further indicated that he was arrested while dragging by means of otter trawl for scup and fluke, which are migratory fish, in the waters described by the 1923 Act.

The Superior Court reserved decision on the case and, on May 23, 1974, reported to the Appeals Court the questions of law raised by Westcott's motion to dismiss. However, on May 15, 1975, before briefing and argument in the Appeals Court had taken place, the Supreme Judicial Court granted direct appellate review. Thereafter, on March 12, 1976, the Supreme Judicial Court, declaring that the 1923 Act violates the Privileges and Immunities Clause, and without ruling on Westcott's Equal Protection claim, entered a judgment remanding the case to the Superior Court with the direction that the motion to dismiss be allowed.[1]

Reasons for Granting the Writ

I. The Decision of the Supreme Judicial Court Involves a Substantial Federal Question Not Heretofore Decided by This Court.

In deciding that the 1923 Act violates the Privileges and Immunities Clause, the Supreme Judicial Court relied exclusively on the authority of *Toomer* v. *Witsell,* 334 U.S. 385, 395-402 (1948). It has been, and continues to be, the contention of Massachusetts that the enactment by Congress of the Submerged Lands Act of 1953, five years after *Toomer,* has fundamentally altered the nature of State power over coastal fisheries and has thus revised the premises on which the *Toomer* decision was based. This Court has never had occasion to address the relationship between the Submerged Lands Act, the nature of State power over coastal fisheries, and the Privileges and Immunities Clause. The instant case squarely presents such an opportunity.

[1] Mr. Justice Reardon, dissenting, expressed the view that the 1923 Act is constitutional.

Moreover, the Massachusetts statute struck down by the Supreme Judicial Court is only one of many State statutes raising the same issue. At least twenty-two other statutes of nine States also differentiate between residents and nonresidents relative to the right to take fish in coastal waters.[2] While the decision of the Supreme Judicial Court directly invalidates only the 1923 Massachusetts statute, it will, of course, have a substantial *stare decisis* impact on the other statutes as well. In reality, it will become guiding precedent in the area. Clearly, when the determination of a novel federal question entails such broad ramifications, it is this Court, and not a State Court, which should be the author of that determination.

Finally, State statutes of the kind here at issue ultimately suggest not only a Privileges and Immunities question but an Equal Protection question as well. The Equal Protection question is currently before this Court in *Douglas* v. *Seacoast Products, Inc.* (No. 75-1255) (probable jurisdiction noted April 26, 1976). However, the *Douglas* case does not present the Privileges and Immunities question. Thus, this case complements *Douglas* and offers the Court an opportunity, by way of

[2] Those statutes are Del. Code Ann., Conservation Law, tit. 7, §§917, 1115, 1119 (1974); Ann. Code of Md., Natural Resources, §§4-618, 4-703, 4-704, 4-805, 4-1003, 4-1004 (1974 and Supp. 1975); Mass. Gen. Laws Ann., ch. 130, §§38, 55 (1976); Mich. Comp. Laws Ann., §308.24 (1967); N.H. Rev. St. Ann. §211.23, 211.62-d (Supp. 1975). McKinney's Consolidated Laws of N.Y., Environmental Conservation Law, §§13-0333, 13-0335, 13-0341(7) (1973); Gen. Laws of R.I., §§20-6-1, 20-6-2, 20-12-2 (1968 and Supp. 1975); Vt. Stat. Ann., title 10, §4608 (1973); and Va. Code §28.1-60 (1950).

certiorari and consolidation, to consider both questions contemporaneously.

For all of the above reasons, review of the decision of the Supreme Judicial Court is appropriate.

II. The Decision of the Supreme Judicial Court Is in Error.

The Supreme Judicial Court chose not to recognize that the Submerged Lands Act had deprived the decision in *Toomer* v. *Witsell, supra,* of its vitality. Instead the Court asserted that the *Toomer* decision remained as its guidepost. As noted above, Massachusetts disagrees.

The underlying action in *Toomer* was one to enjoin the enforcement of a South Carolina statute which imposed a prohibitory license fee on nonresident boats taking fish from the marginal sea within three miles of that State's coastline. The plaintiff, a nonresident of South Carolina, claimed that the statute was violative of the Privileges and Immunities Clause.

Earlier authority appeared to be conclusive of the statute's validity. In *McCready* v. *Virginia,* 94 U.S. 391 (1877), the Court had ruled that a Virginia statute prohibiting nonresidents from planting oysters in the beds of its tidewaters did not violate the Privileges and Immunities Clause. The basis of the opinion had been stated as follows:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the people in their united sovereignty. The title

> thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.
>
> . . . . . .
>
> . . . [W]e think we may safely hold that the citizens of one State are not invested by [the Privileges and Immunities Clause] with any interest in the common property of the citizens of another State." *Supra* at 394-395. (Citations omitted.)

Articulated another way, it had been the view of the Court that the citizens of a State derive their right to use a fishery located in the tidewaters of that State, not from the mere fact of their citizenship, but from the fact that, as citizens, they collectively own the fishery. Such being the case, their right could not be deemed a privilege or immunity of citizenship. *See also Corfield* v. *Coryell,* 6 F. Cas. 546, 551-552 (C.C.E.D. Pa. 1823).

However, the *Toomer* Court, noting that the fish involved in *McCready* were stationary and located in tidewaters, while those involved in *Toomer* were free-swimming and located in the marginal sea, declared that a State's

interests in each of the two types of fish was fundamentally different. The specific difference was that, while a State's interests in the former might be proprietary in nature, its interests in the latter were not. *Supra* at 401-403. Such being the case, the right of a State's citizens to take free-swimming fish from the marginal sea could not be viewed as a property right but must, instead, be considered to be a privilege or immunity of citizenship which could not be denied to nonresidents. On that premise, the Court proceeded to declare the South Carolina statute unconstitutional.

While the *Toomer* decision would, at first, appear to be controlling of the instant case, its authority must nevertheless be considered in light of subsequent developments in the law of coastal resource management. More or less contemporaneously with its decision in *Toomer,* this Court had determined that the United States, and not the individual coastal States, possessed "paramount rights" in the marginal sea and control over the resources located therein. *United States* v. *Texas,* 339 U.S. 707, 715-720 (1950); *United States* v. *Louisiana,* 339 U.S. 699, 704-706 (1950); *United States* v. *California,* 332 U.S. 19, 29-41 (1947). The views of the Court reflected by that determination were, of course, apparent in the *Toomer* decision itself. *See Toomer, supra* at 402-403. However, public reaction to the *Texas, Louisiana* and *California* decisions was not favorable. In particular, Congress considered them to constitute a usurpation by the Federal Government of rights which had historically belonged to the States. *See* H.R. REP. No. 215, 83d Cong., 1st Sess. 15, 34-53 (1953); S. REP. No. 133, 83d Cong., 1st Sess. 6-8, 54-74 (1953). The result was the enactment of the Submerged Lands Act. *See* H.R. REP. No. 215, *supra* at 5; S. REP. No. 133, *supra* at 5.

The Act is now embodied in 43 U.S.C. § 1301 *et seq.* (1966). By way of 43 U.S.C. § 1311(a), Congress has expressly conveyed to the respective coastal States some of the paramount rights which the United States had been deemed to possess. The section provides:

> "It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . ."

The definition of the term "natural resources," as set forth in § 1301(e), includes all fish.

Section 1311(a) clearly appears to convey rights of a proprietary nature. That it has, in fact, done so has been confirmed by the decision of this Court in *Alabama* v. *Texas,* 347 U.S. 272 (1954), wherein the Court upheld the constitutionality of the Act as a proper exercise of the power, granted to Congress by U.S. CONST., Art. IV, § 3, cl. 2, "to dispose of . . . Property belonging to the United States." Thus, it would seem that the respective coastal States now possess the same rights concerning free-swimming fish in the marginal sea as they have always possessed concerning stationary fish in the tidewaters. If it is true that the States do possess such rights, then the basic distinction drawn by the Court in *Toomer, supra,*

between the facts of that case and the facts of the *McCready* case, *supra,* has been eliminated. Moreover, if it is true that the distinction has been eliminated, then *McCready,* rather than *Toomer,* is now controlling of all cases wherein a State statute prohibiting nonresident fishing is challenged as violative of the Privileges and Immunities Clause, including the instant case.

Given *McCready* as controlling of the instant case, one must conclude that the decision of the Supreme Judicial Court to the effect that the 1923 Act of Massachusetts is violative of the Privileges and Immunities Clause is erroneous and should be reversed.

Conclusion

For the reasons stated above, Massachusetts urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, ss: SITTING, 1975

No. 300

COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
JACK B. WESTCOTT,
APPELLEE.

OPINIONS ISSUED MARCH 12, 1976

BRAUCHER, J. Statute 1923, c. 35, as amended by St. 1962, c. 219, in effect prohibits nonresidents of Massachusetts from dragging for fish in Vineyard Sound during the months of July, August and September.[1] On the authority of *Toomer* v. *Witsell,* 334 U.S. 385 (1948), we hold that the statute violates the privileges and immunities clause of the Constitution of the United States. U.S. Const. art. IV, § 2. We do not answer the question whether the requirement of legal residence "during the preceding year" vio-

[1] "It shall be unlawful during the months of July, August and September for any person who has not been a legal resident of this commonwealth during the preceding year to use beam or otter trawls to drag for fish in that part of the waters of Vineyard Sound lying in the towns of Chilmark, Gay Head and Gosnold, and included between an imaginary line running from the extreme western point of Gay Head to the extreme western point of Nashawena island and another imaginary line running from Cape Higgon to Tarpaulin Cove Light. Violation of this act shall be punished by a fine of not less than five hundred nor more than one thousand dollars."

lates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The defendant was arrested on September 5, 1973, by an officer of the Department of Natural Resources while engaged in dragging by means of an otter trawl for scup and fluke, which are migratory fish. His vessel was registered out of Point Judith, Rhode Island, and he was and is a resident of Narragansett, Rhode Island. He had not been a legal resident of the Commonwealth during the year preceding the arrest. The arrest occurred within waters covered by the statute.

The defendant was found guilty as charged in the District Court of Dukes County. On appeal to the Superior Court, the parties submitted a statement of agreed facts. The judge reserved decision on the defendant's motion to dismiss. Under G.L. c. 278, § 30A, the judge reported the case so far as necessary to present the following questions of law, and we granted the Commonwealth's application for direct appellate review:

"1. Does Chapter 35 of the Acts of 1923 as Amended violate the Privileges and Immunities Clause in Article IV §2(1) of the Constitution of the United States, by imposing differential treatment between fishermen who are residents of the Commonwealth and those who are not?

"2. Do the criteria for legal residence in the Commonwealth during the preceding year as provided in Chapter 35 of the Acts of 1923 violate the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

1. *The ownership theory.* The Commonwealth's argument as to the first question rests largely on *McCready* v. *Virginia,* 94 U.S. 391 (1876). There the Supreme Court upheld a Virginia statute prohibiting nonresidents from planting oysters in the beds of its tidewaters. The court said the States owned the beds, the tidewaters themselves,

"and the fish in them, so far as they are capable of ownership while running." *Id.* at 394. The planting of oysters in tidewater beds was like the planting of corn on dry land owned by the State; in both cases, the State could confine the use of the land to its own citizens. *Id.* at 396.

Later cases did little to reinforce the concept of ownership of migratory fish in the marginal sea. In *Manchester* v. *Massachusetts,* 139 U.S. 240, 265 (1891), a regulation of fishing in Buzzards Bay was upheld; "it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other States." In *Missouri* v. *Holland,* 252 U.S. 416, 434 (1920) (Holmes, J.) dealing with migratory birds, the court said, "To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership."

In *Toomer* v. *Witsell,* 334 U.S. 385 (1948), a South Carolina statute discriminated against nonresidents fishing for migratory shrimp in the marginal sea. The Supreme Court held that the statute violated the privileges and immunities clause, which bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* at 396. "The whole ownership theory, in fact," the court said, "is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* at 402. The *McCready* case was distinguished as involving stationary oysters rather than free-swimming fish, and tidewaters rather than marginal sea. *Id.* at 401.

The *Toomer* case has been treated as controlling in cases like ours. *Brown* v. *Anderson,* 202 F. Supp. 96, 102-103

(D. Alas. 1962). *Gospodonovish* v. *Clements,* 108 F. Supp. 234, 237 (E.D. La. 1951), *appeal dismissed,* 344 U.S. 911 (1953). *Edwards* v. *Leaver,* 102 F. Supp. 698, 703 (D. R.I. 1952). *Russo* v. *Reed,* 93 F. Supp. 554, 559-560 (D. Me. 1950). *Steed* v. *Dodgen,* 85 F. Supp. 956, 958 (W.D. Tex. 1949). *Dobard* v. *State,* 149 Tex. 332, 342 (1950). Cf. *Mullaney* v. *Anderson,* 342 U.S. 415, 417 (1952); *Schakel* v. *State,* 513 P.2d 412, 414 (Wyo. 1973) (deer hunting). But cf. *Anderson* v. *State,* 213 Ark. 871, 875 (1948) (fishing in inland waters); *State* v. *Kemp,* 73 S.D. 458, 465 (1950), *appeal dismissed,* 340 U.S. 923 (1951) (non-resident hunters of migratory water fowl constituted "a peculiar source of evil"). Similar decisions have been made under the equal protection clause of the Fourteenth Amendent. *Takahashi* v. *Fish & Game Comm'n,* 334 U.S. 410, 421 (1948) (discrimination against aliens). *Edwards* v. *Leaver, supra* (discrimination against corporations). The *McCready* case, if it retains any vitality, seems now to be restricted to shellfish or to tidewaters. See *State* v. *Norton,* 335 A.2d 607, 615 (Me. 1975) (clams); *Bruce* v. *Director, Dep't of Chesapeake Bay Affairs,* 261 Md. 585, 607-611 (1971) (oysters).

2. *The Submerged Lands Act of 1953.* The Commonwealth contends that the rationale of the *Toomer* case has been completely undercut by the enactment of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970). Section 1311(a) of that act declares that "title" to the "natural resources" within "navigable waters within the boundaries of the respective States" is vested in the respective States, and § 1301(e) defines "natural resources" to include "fish." Vineyard Sound is undoubtedly part of the navigable waters of Massachusetts. Hence, it is argued, the ownership theory rejected in the *Toomer* case has now been revived by act of Congress.

The Submerged Lands Act of 1953 was a congressional response to three Supreme Court cases: *United States* v. *Texas,* 339 U.S. 707 (1950). *United States* v. *Louisiana,* 339 U.S. 699 (1950). *United States* v. *California,* 332 U.S. 19 (1947). Those cases had held that the Federal government and not the individual coastal States had paramount rights in the marginal sea and control over the resources contained therein. "The Act merely confirmed the States' pre-existing rights . . . by, in effect, quitclaiming all federal claims thereto." *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 318 (1973). We think, in the language of the *Toomer* case, that the ownership language of the act should be read as "legal shorthand" for the "power to preserve and regulate," at least in its application to fish swimming in the ocean.

Decisions under the act have not given it any such effect as that for which the Commonwealth contends. In *Corsa* v. *Tawes,* 149 F. Supp. 771, 773 (D. Md.), *aff'd,* 355 U.S. 37 (1957), the court cited the act in deciding that regulation of coastal fisheries is "within the police power of the individual states," but did not reach the problem of discrimination against nonresidents. 149 F. Supp. at 777-778. In *Kake* v. *Egan,* 174 F. Supp. 500, 502-504 (D. Alas. 1959), *aff'd sub nom. Metlakatla Indian Community, Annette Island Reserve* v. *Egan,* 362 P.2d 901, (Alas. 1961), *aff'd sub nom. Kake* v. *Egan,* 369 U.S. 60 (1962), the court cited the *Toomer* case and the act; it said that the ownership theory "has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources [fish] for all the people." See *Glenovich* v. *Noerenberg,* 346 F. Supp. 1286, 1291-1293 (D. Alas.), *aff'd* 409 U.S. 1070 (1972). In *Brown* v. *Anderson,* 202 F. Supp. 96, 102-103 (D. Alas. 1962), a case like the present one,

the State statute was held unconstitutional on the authority of the *Toomer* case, without mention of the act.

3. *Durational residence requirement.* Our conclusion that the statute violates the privileges and immunities clause makes it unnecessary to consider whether the requirement of residence for one year violates the equal protection clause. See *Massey* v. *Apollonio,* 387 F. Supp. 373, 376-377 (D. Me. 1974) (three-year residence for lobstermen unconstitutional). Compare *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 258-260 (1974), with *Sosna* v. *Iowa,* 419 U.S. 393, 409 (1975).

4. *Disposition.* We answer the first question reported by the Superior Court "Yes." We do not answer the second question. The case is remanded to the Superior Court, where the defendant's motion to dismiss is to be allowed.

So ordered.

Reardon, J. (dissenting). It is my view that there is no violation of the privileges and immunities clause. In *McCready* v. *Virginia,* 94 U.S. 391, 395 (1876), involving a Virginia statute prohibiting nonresidents from planting oysters in the beds of its tidewaters, it was made clear that the tidewaters themselves were owned by the States as well as the fish in them "subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States." The court went on to say that there was no such grant of power over the fisheries which remain under the exclusive control of the State which may regulate their use, again assuming no obstruction of navigation.

The *McCready* case was followed by *Toomer* v. *Witsell,* 334 U.S. 385 (1948), involving a South Carolina statute which provided for an extremely expensive license fee on nonresidents fishing for migratory shrimp within the three-mile maritime belt (the marginal sea) off the coast of that State. In the *Toomer* case the court distinguished the *McCready* case on the grounds that (1) *McCready* was concerned with the taking of oysters which are essentially stationary while the *Toomer* case involved the taking of free-swimming fish; and (2) the ownership rights of the States in the marginal sea are different from their rights in their tidewaters. 334 U.S. at 401.

The *Toomer* case was followed by the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301 *et seq.* (1970).[1] As the

[1] The following sections are of importance:

§ 1301. "Definitions.

. . .

"(a) The term 'lands beneath navigable waters' means—(1) all lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction."

"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

"(e) The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power."

§ 1311. "Rights of the States.

"(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use.

"It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective

majority opinion recognizes: "The Submerged Lands Act of 1953 was a congressional response to three Supreme Court cases: *United States* v. *Texas*, 339 U.S. 707 (1950).

States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof."

§ 1312. "Seaward boundaries of States.

"The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

§ 1314. "Rights and powers retained by the United States; purchase of natural resources; condemnation of lands.

"(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title."

United States v. *Louisiana*, 339 U.S. 699 (1950). *United States* v. *California*, 332 U.S. 19 (1947). Those cases had held that the Federal government and not the individual coastal States had paramount rights in the marginal sea and control over the resources contained therein." *Ante* at .[*] As the legislative history makes clear, both the Senate and House committees which favorably reported the bill[2] considered the holdings of these three cases a usurpation by the Federal government of what had been perceived as the States' traditional rights of ownership and control in this area. H.R. Rep. No. 215, 83d Cong., 1st Sess. 15, 34-53 (1953). S. Rep. No. 133, 83d Cong. 1st Sess. 6-8, 54-74 (1953) (1953 U.S. Code Cong. & Ad. News 1385, 1399, 1417-1437, 1479-1481, 1505-1526). Congress sought to remedy this situation through the Submerged Lands Act, the purpose of which was to establish and confirm the claims and rights of the respective States to the lands beneath the marginal seas and the resources within such lands and water, by conveying to the States whatever rights the Federal government had in those lands and resources. H.R. Rep. No. 215, *supra* at 5. S. Rep. No. 133, *supra* at 5. That a proprietary right was conveyed to the States was confirmed in *Alabama* v. *Texas*, 347 U.S. 272 (1954), in which the Supreme Court upheld the constitutionality of the act as a proper exercise of Congress's power "to dispose of . . . Property belonging to the United States" under Article IV, § 3, cl. 2, of the United States Constitution.

Since "fish" are included among the "natural resources," "title to and ownership of" which have been vested in the States (43 U.S.C. § 1301(e) and § 1311[a][1][1970]), it would appear that the act intends that the

[*] Mass. Adv. Sh. (1976) at .

[2] The Committee on the Judiciary in the House and the Committee on Interior and Insular Affairs in the Senate.

States shall possess the same ownership rights in migratory fish swimming in waters within the three-mile limit as they possess with respect to tidewater fish. In effect the Submerged Lands Act squares the present case with the *McCready* case. The two grounds which were used to distinguish *McCready* in the *Toomer* case are no longer pertinent.

The majority opinion marshals a large number of cases in support of its proposition that "[t]he *Toomer* case has been treated as controlling in cases like ours." *Ante* at .[b] However, all but two of those cases were decided prior to the passage of the Submerged Lands Act in 1953. Of the two post-1953 cases one is concerned with deer hunting in Wyoming (*Schakel* v. *State,* 513 P.2d 412, 414 [Wyo. 1973]), and the other is an Alaskan Federal district course case which does not discuss the impact of the act (*Brown* v. *Anderson,* 202 F. Supp. 96, 102, 103 [D. Alas. 1962]). Had the Submerged Lands Act not intervened, the cases cited by the majority opinion would be instructive. However, since the outcome of the present case turns on the act and its interpretation, I do not find cases decided before the act became law to be especially relevant authority. For similar reasons I do not consider cases dealing with deer hunting, an activity to which the act clearly does not apply, nor cases which do not even consider the impact of the act on fishing rights, to be useful precedents for resolving the issue now before us.

The majority opinion when it does turn to the Submerged Lands Act dismisses its impact with the statement: "We think, in the language of the *Toomer* case, that the ownership language of the act should be read as 'legal shorthand' for the 'power to preserve and regulate,' at least in its application to fish swimming in the ocean." *Ante* at .[c]

[b] Mass. Adv. Sh. (1976) at .
[c] Mass. Adv. Sh. (1976) at .

The opinion does not develop why the clear language of the statute should be given such a construction contrary to its plain meaning. Section 1311(a)(1) establishes in the States "title to and ownership of" natural resources, including fish, within the three-mile limit; § 1311(a)(2) deals with "the right and power to manage" said resources. The legislative history indicates that the rights of ownership and the rights of management were placed in separate clauses and made independent of one another in order to preserve under the separability clause (Submerged Lands Act of 1953, c. 65, tit. II, § 11, 67 Stat. 33) the latter powers should the conveyance of title and ownership be eventually ruled unconstitutional. S. Rep. No. 133, *supra* at 13, 19; pt. 2, 9-10, 13-14 (1953 U.S. Code Cong. & Ad. News 1486, 1495, 1543, 1546-1547). However, the United States Supreme Court in *Alabama* v. *Texas, supra,* upheld the constitutionality of the conveyance of "title to and ownership of" the lands and resources described in the act. By construing the ownership language of § 1311(a)(1) to mean no more than the management and regulation language of § 1311(a)(2), this court today essentially reads the former section out of the statute. Even a cursory reading of the legislative history indicates that the Congress was well aware that § 1311(a)(1) was concerned with an *ownership* interest in the ordinary sense of the word and not merely a power to preserve and regulate. H.R. Rep. No. 215, *supra* at 5-6, 15, 24-47. S. Rep. No. 133, *supra* at 5, 54-68 (1953 U.S. Code Cong. & Ad. News 1385, 1388-1389, 1399, 1417-1431, 1479, 1505-1520). Given the language and the structure of the statute, the legislative history, and the decision in *Alabama* v. *Texas, supra,* I can discern no justification for a statutory construction which renders the ownership language of § 1311(a)(1) a nullity, an empty congressional exercise, with respect to fish.

Of course, it still may be argued that even conceding

that the Commonwealth has ownership rights in the fish within its three-mile limit, the privileges and immunities clause prohibits the Commonwealth from exercising those property rights in such manner as to exclude nonresident fishermen; and perhaps this is what the majority intended in their treatment of the ownership language of the act. However, this position would in effect overrule the *McCready* case. While there is language in the *Toomer* case (334 U.S. at 401-402), questioning the viability of *McCready*, I would not be inclined to follow that path. Such language is not only dictum but was written at a time when the Supreme Court was clearly of opinion that the States did not possess any proprietary interests in the marginal sea. See *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *California*, 332 U.S. 19 (1947). Congress, through the passage of the Submerged Lands Act, has so altered the nature of the States' interests in the marginal sea and the resources therein, including fish, that this dictum in the *Toomer* case, whatever its vitality at the time, is not a reliable guide to current Federal law.

While Congress of course could not overrule *Toomer's* resolution of the constitutional issue, it could, and I think did, alter the premises on which the decision was based. The basic assumptions which animated the Court's analysis in *Toomer* (as well as in the other cases of that time dealing with the rights of the States in the marginal sea) were the objects of congressional attention in the Submerged Lands Act. The dictum in *Toomer* alluded to above was clearly based on an opinion that State property interests in the resources in the marginal sea did not exist, and were but "fiction[s]" and "legal shorthand" (334 U.S. at 402).

Finally, while the majority do not rely on this argument, it is strenuously advanced by the defendant that whatever

the status of the State's ownership interests in the migratory fish within the marginal sea, the legislative history of the act, particularly portions of the debates in the House of Representatives, indicates that Congress did not intend to confer on the States the power to exclude out-of-State fishermen.[3] On the floor of the House, Mr. Colmer offered two amendments which would have prohibited unreasonable discrimination by a State in favor of its own citizens (as compared with citizens of other States) in the control and use of "national resources" in the first amendment, and the control, use, licensing, and taking of "fish, shrimp, and other migratory marine animal life" in the second amendment. 99 Cong. Rec. 2563-2564 (1953).[4] Both amendments were defeated. In the debate on the first amendment, Mr. Graham, chairman of the subcommittee which had held hearings on the bill,[5] stated that in his opinion

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[3] The debates in the House focused primarily on the rights to the oil and gas reserves under the marginal sea rather than on the question of fishing rights. However, on a number of occasions members did address themselves to fishing problems recognizing that the ownership of fish, as well as that of other natural resources, was to be conveyed to the States by the bill. See 99 Cong. Rec. 2488 (1953) (remarks by Mr. Colmer and of Mr. Celler); 2499 (remarks of Mr. Nicholson); 2583 (remarks of Mr. Williams).

[4] The first amendment read: "On page 6, line 4, after the words 'natural resources', insert the following: 'subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State or its grantees of the citizens of another State in the management, administration, leasing, controlling, developing, and use of the said national resources.' " 99 Cong. Rec. 2563 (1953).

The second amendment read: "On page 6, line 4, after the words 'State resources', insert 'subject to the condition that there shall be no unreasonable disparity between the treatment by a State or its grantees of its citizens and the treatment by such State and its grantees of the citizens of another State in the management, administration, controlling, use, licensing, and taking of fish, shrimp, and other migratory marine animal life.' " 99 Cong. Rec. 2563-2564 (1953).

[5] Subcommittee No. 1 (Immigration and Nationality) of the Committee on the Judiciary.

the amendment was unnecessary given the Supreme Court's holding in the *Toomer* case. 99 Cong. Rec. 2563 (1953). However, in the debate on the second amendment Mr. Graham stated, "[I]t has always been my understanding that anything of a migratory nature, like migratory birds and such, must be settled by treaty or compact. This whole matter can be settled as between the States of Mississippi and Louisiana or between the States south thereof by a compact." 99 Cong. Rec. 2564 (1953). Of course if the content of Mr. Colmer's second amendment were already the law of the land or implicitly incorporated into the act, there would be no need for the compacts between the States referred to by Mr. Graham in urging the defeat of the amendment. The defendant places substantial reliance on what are simply the self-serving remarks of the proponent of the defeated amendments. In short, the legislative history on this point is ambiguous and inconclusive and does not compel the statutory interpretation the defendant advances.

I would conclude that the Submerged Lands Act establishes, conveys and vests an ownership interest in the States in the migratory fish within the marginal sea. Construing the statute in light of the *McCready* case demonstrates the propriety and constitutionality of the prohibition of nonresidents from fishing in those Massachusetts waters which St. 1923, c. 35, provides. The net effect of the Federal act and the *McCready* case is to establish a property right in that three-mile limit which the State can protect as it has done in this instance. There is thus no violation of the privileges and immunities clause.

The wisdom of the policies expressed in the Submerged Lands Act and in St. 1923, c. 35, is not the issue before us. Perhaps the Submerged Lands Act was not a wise piece of legislation. There were certainly many in Congress who expressed such a view (see H.R. Rep. No. 215, *supra*

at 58-60, 80-101, 114-124; S. Rep. No. 133, pt. 2, *supra* at 1-53 [1953 U.S. Code Cong. & Ad. News 1439-1473; 1534-1588]); and President Truman vetoed similar legislation twice (92 Cong. Rec. 10660 [1946]; 98 Cong. Rec. 6251 [1952]). But Congress persisted and did pass the act which was signed into law in 1953 by President Eisenhower. Act of May 22, 1953, Pub. L. No. 31, 67 Stat. 29. As for St. 1923, c. 35, perhaps a more "enlightened" course for Massachusetts would be to allow nonresidents to utilize its resources as freely as its own residents do. However, the Legislature has not arrived at this judgment, and I do not think in the circumstances presented by this case it was constitutionally compelled to do so.

I would conclude also that the statutory classification based on residency in Massachusetts does not constitute a violation of the equal protection clause. As discussed above, the Commonwealth has an ownership interest in the fish within its coastal waters out to the three-mile limit. "For this purpose the . . . [Commonwealth] represents its people, and the ownership is that of the people in their united sovereignty." *McCready* v. *Virginia, supra* at 394. See *Toomer* v. *Witsell, supra* at 408 (Frankfurter, J., concurring); *Maine* v. *M/V Tamano,* 357 F. Supp. 1097, 1100-1101 (D. Me. 1973). In this context there is a valid legislative purpose in preserving for the residents of the Commonwealth the fishing resources within its territorial waters; and the exclusion of out-of-State fishermen cannot be deemed arbitrary, capricious, irrational, or an invidious discrimination.

The facts of the present case do not provide an occasion to treat the durational aspect of the residency requirement of St. 1923, c. 35. The defendant is not a resident of Massachusetts, the record contains no indication that he desired to be a resident, and the requirement of one year's residency in no way brought the defendant within

the terms of the statute or increased his liability thereunder. Successful challenges to durational residency requirements have involved citizens of the State in which those challenges occurred. See, e.g., *Memorial Hosp.* v. *Maricopa County,* 415 U.S. 250 (1974); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

I would thus conclude that St. 1923, c. 35, is constitutional as applied against the defendant.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, ss: SITTING, 1975

No. 300

COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,
v.
JACK B. WESTCOTT,
APPELLEE.

JUDGMENT ENTERED MARCH 12, 1976

We answer the first question "Yes." We do not answer the second question. The case is remanded to the Superior Court, where defendant's motion to dismiss is to be allowed.